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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 504

CHARLES MATTHEWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Clumbia Circuit

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Petitioner Charles Matthews prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the District of Columbia Circuit, entered on May 29, 1963, and July 30, 1963.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in Appendix A, attached hereto, infra, and is reported in —— F. 2d ——. The Order Denying the Petitioner's Motion for a

rehearing En Banc is printed in Appendix C, attached hereto. The Judgment of the District Court for the District of Columbia is printed in Appendix B and the Order of the Court of Appeals denying Petitioner's Motion to Stay Transmission of The Opinion and Certified Copy of the Judgment (Unreported) is printed in Appendix D, attached hereteo, infra.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 29, 1963 (Appendix A, infra) and the Petition for Rehearing En Banc was denied on July 30, 1963 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 ; in that the judgment herein sought to be reviewed on Certiorari was rendered in a criminal action, suit or proceeding, to wit, a proceeding pursuant to 18 U.S.C. 371, 21 U.S.C. 174, 26 U.S.C. 4704(a) and 4705(a) for the purpose of charging the Petitioner with violating the Conspiracy laws of United States and committing several substantive acts contrary to the narcotic laws of the United States.

Questions Presented

1. Is it within the fair and equitable intent of Statutes involved and does it accord due process of law to convict a citizen on the uncorroborated testimony of an alleged accomplice who admits that he is a drug user, a seller of narcotics, a paid informant for the Government, an acceptor of legal assistance from an attorney hand-picked by the prosecutor, and a defendant turned government witness because of implied and gratified promises to assist him in lowering his bond and inferring that all other charges would be dropped if he pleaded guilty to one of four counts charged against him in the indictment?

1a. Did the Government meet its exceptionally heavy burden of proving the defendant Matthews guilty beyond

a reasonable doubt of the three counts he was found guilty of by the jury in light of the evidence offered or did the trial court err in allowing the defendant's case to go to the jury at all?

1b. Were the trial court's instructions so weak and slanted in the Government's favor as to what weight had to be given to the Government's star witness against the defendant Matthews, that it was plain error calling for a reversal of the judgment entered against said defendant?

Statutes and Rules Involved

Title 18 U.S.C. sec. 371 provides:

> Conspiracy to commit offense or to defraud United States—
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

Title 21, United States Code, Section 174:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (Feb. 9, 1909, ch. 100 § 2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§ 1, 5(1), 65 Stat. 767; July 18, 1956, ch. 629, Title I, § 105, 70 Stat. 570.)"

Title 26, United States Code, Section 4704(a):

"* * * and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found . . . (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 550, amended Aug. 31, 1954, ch. 1147, § 8, 68 Stat. 1004.)"

Title 26, United States Code, Section 4705(a):

"(a) General requirement

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate . . .

"(Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 551, amended Aug. 31, 1954, ch. 1147, §§ 6, 7, 68 Stat. 1003; Aug. 1, 1956, ch. 852, § 12(c), 70 Stat. 909.)"

Rule 30, Federal Rules of Criminal Procedure:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52, Federal Rules of Criminal Procedure:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

STATEMENT OF THE CASE

An indictment was filed in the District Court charging the Petitioner Charles Matthews and six others with various offenses against the narcotic laws of the United States. These charges were contained in 21 of 22 counts in the indictment. The first count of the indictment charged all of the defendants with the offense of conspiracy under Title 18 sec. 371 U.S.C.A.[2] The remaining 21 counts arose out of seven (7) alleged substantive offenses involving the transfer by some of the defendants of narcotic drugs to two undercover agents of the Federal Bureau of Narcotics (Herman A. Scott and Thomas E. Broadnax, Jr.)[3] Each alleged transfer (sale) gave

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[1] The other defendants were: Ellen M. Phelps; Roland R. Henry; Norman Pannell; Valaria Pannell, Clinton Johnson and Doris L. Gardiner. Six of the seven named defendants went to trial. Clinton Johnson pleaded guilty to one of the counts in the indictment (count 3) at the start of the trial, and later testified during the trial as a government witness.

[2] The jury acquitted all six of the defendants of the conspiracy count.

[3] Ellen M. Phelps was found not guilty by the jury of the 16 Counts that she was charged in. The defendant Roland R. Henry was also charged in 16 Counts in the indictment and was found not guilty by the jury. The defendants, Norman Pannell and Valaria Pannell, husband and wife, were found guilty of the three

rise to three (3) counts in the indictment;—a violation of Title 26 U.S.C. Sec. 4705(a), 26 U.S.C. Sec. 4704(a) and 21 U.S.C. sec. 174. The seven (7) alleged transactions were as follows:

1. On December 21, 1961, the defendant Clinton Johnson sold Herman Scott a quantity of heroin (Counts 2, 3 and 4).

2. On January 11, 1962, Doris L. Gardiner sold a quantity of drugs to Thomas E. Broadnax, Jr. (Counts 4, 5, 6 and 7).

3. On January 22, 1962, the defendants Norman and Valaria Panneh sold a quantity of heroin to Herman A. Scott (Counts 8, 9 and 10).

4. On January 26, 1962, Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 11, 12 and 13).

5. On February 8, 1962, the defendant Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 14, 15 and 16).

6. On February 20, 1962, the defendant Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 17, 18 and 19).

7. On February 21, 1962, the defendant Doris L. Gardiner sold a quantity of narcotic drugs to Thomas E. Broadnax, Jr. (Counts 20, 21 and 22).

Your petitioner Charles Matthews was charged in every Count of the indictment. In Count One (the conspiracy count) he was charged as a co-conspirator with all of the other defendants. In Counts 2, 3 and 4 (the alleged sale of drugs by Clinton Johnson to Herman A. Scott on December 21, 1961) he was charged as a principal on the theory that he aided and abetted this offense. On the remaining 18 Counts (5 through 22), he was charged on the theory that as a co-conspirator he was responsible

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Counts that they were charged in. The defendant Doris L. Gardiner was found guilty of 15 Counts in which she was charged.

as a principal for the unlawful acts of his fellow conspirators, who sold drugs to the Federal Agents. On all counts in which the appellant was charged as a co-conspirator, that is, Count One and the other 18 Counts (Counts 5 through 21), the jury found him *not guilty*. He was found guilty of only the three counts in which it was charged that he aided and abetted the sale of drugs made by Clinton Johnson to Herman A. Scott. In other word your petitioner was found *not guilty* of 19 out of the 22 counts.

Since Charles Matthews was only convicted of offenses dealing with the sale made by Clinton Johnson on December 21, 1961, to Herman A. Scott, this Statement of Facts will be confined to the facts pertaining to these offenses, and will deal with other events of the trial only insofar as they bear upon the questions and issues raised in petitioner's quest for the writ of certiorari.

Testimony of the Government Witnesses

Herman A. Scott and Clinton Johnson were the two government witnesses who testified about the sale of December 21, 1961. Herman A. Scott testified that on December 21, 1961, he was employed as a Narcotics Agent for the Federal Bureau of Narcotics and was stationed in Washington, D.C. and stated that he was working in an undercover capacity, posing as one interested in the illicit narcotics traffic; and in this pose he made illegal purchase of drugs. One of the persons among others with whom he had established as one of his suppliers was [illegible] Clinton Johnson, from whom he had been buying drugs for about two months then. Johnson testified he did not know Scott's true identity until after his arrest in January of 1962.

Scott testified that at about 10:35 A.M. on December 21, 1961, he called Clinton Johnson on the telephone. Scott claimed at the time he was at the office of the

Federal Bureau of Narcotics. This was the first of three telephone calls that Scott testified he made to Clinton Johnson that day. In this first call he testified that asked Johnson if he could get him a half ounce of heroin. In reply, he said that Clinton Johnson told him that he could get the drugs because he had spoken to the appellant Matthews earlier in the morning.[4] Scott then testified that Clinton Johnson told him that it would cost $125.00 and asked him to bring the money over to his apartment.

Scott further testified that pursuant to this conversation he obtained $125.00 of official government money and went to Clinton Johnson's home at 1401 Girard Street, Northwest, apartment 40, and gave him the money. He did not then receive any drugs for the money. Scott testified that the arrangements was that Clinton Johnson was to get the drugs from someone else (according to Scott, Johnson said, from the appellant Matthews, *but see footnote 4*). Accordingly, Scott then stated that Johnson asked him to call him back later that day.

Agent Scott said he left the apartment and returned to the Bureau of Narcotics. He said he called Johnson again at about noon. (The second phone call.) According to Agent Scott, Johnson told him that he had not heard from the appellant Matthews and asked him to call back in about one-half hour. (Again see footnote 4).

At approximately 1:40 P.M., Agent Scott said he again called Clinton Johnson and that he told him to come on up to his apartment, that he had just left Matthews and received the heroin. (Again see footnote 4)

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[4] During the cross examination of Agent Scott, the Court permitted recordings of the three telephone conversations between Johnson and Scott on December 21, 1961, to be played in open Court. It was proven by the recordings, and the witness Scott admitted, that Clinton Johnson *did not* mention the appellant's name in any of the three telephone calls; but it was Agent Scott who mentioned his name.

Scott said he arrived at the apartment of Clinton Johnson's about 2:15 P.M. He said when he walked in Johnson pointed out a white glassine envelope that was lying on a table. Scott stated he picked up the package and put it in his jacket pocket, making sure to handle it carefully to preserve fingerprints, if any. The two men had a short conversation and Scott left the apartment.

At the trial Scott identified Government's Exhibit 1B as a glassine envelope that he obtained from Johnson. He also testified that the envelope was sent to the Federal Bureau of Investigation's laboratory for latent fingerprint tests. *Government counsel stipulated that the examination was negative.* Later, during the trial the white powder substance that was in the envelope was identified by a government chemist as being a mixture of heroin hydrochloride.

On cross-examination of Agent Scott, it was brought out that while he was working in an undercover capacity he had purchased drugs from t[redacted] Johnson before this sale of December 21, 1961. On September 21, 1961, Johnson sold him a bottle of liquid cocaine. On the next day, September 22, 1961, Johnson sold him another bottle of cocaine; on December 14, 1961; Johnson sold Scott 25 capsules of heroin.[5]

Scott testified that at no time did he ever see Clinton Johnson in the company of the appellant Mafthews. He also testified that he had no way of being certain that

[5] At this point counsel for the Government stipulated that Johnson was then charged and awaiting trial in two other cases: United States District Court for the District of Columbia Criminal Case No. 288-62 in an indictment with others for the offense of narcotic conspiracy, and the violation of substantive narcotic offenses; United States District Court for the District of Columbia Criminal Case No. 214-62 for the sale of drugs to Scott on the dates mentioned above, and for the possession of 141 capsules of heroin on January 17, 1962, when he was arrested.

what Johnson said about obtaining drugs from Matthews on December 21, 1961, was in fact true. It was also established through the questioning of Scott on cross examination that when Scott made the three telephone calls to Johnson on December 21, 1961, from the office of the Bureau of Narcotics, other agents were present (in fact some were listening in and recording the conversations), and that they knew of the sale that was to take place. (Transcript P 1-47) (JA on appeal 19-22)

Clinton Johnson next testified for the Government about this transaction. He identified Charles Matthews in the Court Room. He said that he received a telephone call at about 10 or 10:30 A.M. on December 21, 1961, from Agent Herman A. Scott. At the time Scott was not using his true name but was known to Clinton Johnson as Ray Wright, a person who was interested in buying drugs for resale. Johnson testified that Scott asked him, during this telephone conversation, if Johnson could get a half ounce of heroin. Johnson stated that he said to Scott that he would have to call back later because he, Johnson, had to make a call and find out first. He testified that, thereafter, he called the appellant Charles Matthews, (But see footnote 4 again) and asked Charles Matthews if he could purchase a half ounce of heroin and that Matthews said yes and would call him back. In about a half hour he said Matthews called him back, saying that he would meet Johnson at 13th and Girard Street, N.W. with the drugs. Johnson said that in the meanwhile Scott came to his apartment and brought $125.00.

Johnson said he met Matthews at 13th and Girard Street, N.W. and that he gave him the $125.00. Johnson testified that Matthews told him that he placed the heroin in some bushes nearby and for Johnson to go pick it up. This Johnson said he did, and said after Matthews saw him, he drove off in his automobile. Johnson stated

he went back to his apartment and later talked to Scott on the telephone. Still later, Johnson said Scott came by his apartment and picked the drugs up.

The cross examination of the witness Johnson showed that there were many things about him and his background that affected his credibility as a witness: He had a criminal record; he had a long history of dealing in the narcotic traffic; he used marijuana; and he was an informer and an accomplice in the sale of drugs that he testified about. These infirmities regarding Johnson were developed as follows:

1. ***Johnson's criminal record***

On May 12, 1950, he was sentenced to 4½ years in prison by the United States District Court for the District of Maryland after having been convicted of selling heroin and possessing marijuana. On June 29, 1955, he was convicted by a jury in the United States District Court for the District of Columbia for violation of the Marijuana Tax Stamp Act and was sentenced on June 1, 1955, to 7 years imprisonment. He received a conditional release from this custody on May 26, 1960. From this day until the expiration of his sentence on January 1, 1962, he was to be under the supervision of the Parole Board.

2. ***Johnson's involvement in the narcotic traffic after release from prison***

Johnson admitted that his first contact with narcotics was in the year 1949. In July or August of 1961, about 11 months after his release from prison and while he was still under the supervision of the Parole Board, he started selling drugs again. He began selling marijuana from his home. He sold drugs from then until he was arrested on January 17, 1962, except when he was out of supply. During this 6- or 7-month period when he

was selling drugs, he sold marijuana, cocaine and heroin. He admitted the two sales of liquid cocaine to Scott (on September 21 and 22, 1961), and the other sale of 25 capsules of heroin to Scott (on September 14, 1961). On January 17, 1962, he was arrested by Agent Ivan Wurms and Agent John Thompson at an alley near his home. He was taken to his apartment by the arresting officers, where they found 141 capsules of heroin secreted therein.

3. ***Johnson's use of marijuana***

Johnson denied that he had used heroin or cocaine but did admit that he had been an addict who smoked marijuana. The last time that he had used marijuana was in the latter part of the year 1961. He denied that he was smoking marijuana regularly.

4. ***Johnson was a paid informer and a witness who testified for the government because he expected to benefit for doing so***

When Johnson was arrested by Federal Agents near his home on January 17, 1962, he said he was questioned but refused to give any information about his illegal activities. He said he was released on bail the next day and about two or three weeks later Agent Wurms called and invited his to come to the Bureau's office. Johnson testified that he met with Agent Wurms and that Wurms asked him to cooperate with the government. He stated was told of the many sales of drugs that he had made to Agent Scott and was advised that as a subsequent narcotic law offender he was subject to a heavy penalty. Johnson said that because he wanted to help himself he agreed to cooperate with the government.

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* The government chemist, William P. Butler, testified on cross examination that marijuana was a plant substance which had been brought under the narcotic control through a Statute of Congress. He said that it is considered a drug but not a narcotic drug.

At the time he agreed to help the agents he said did not expect to receive any money but after talking to a person named Estella Murphy, who was a paid informer, and being told by her that he should ask the agent for some money, he spoke with Mr. Wurms. Johnson stated that Agent Wurms told him he would see what he could do. He testified that he later began to receive money from Agent Wurms from time to time. From the time that he agreed to cooperate with the government down to the time of trial, Johnson estimated that he had received a couple of hundred dollars from him.

He said that the agent told him that he could not make any promises but that they would talk with Assistant United States Attorney Smithson for him. He testified that he later met Mr. Smithson who told him that if he helped the government he would be helping himself. Johnson claimed that nothing definite was said or promised to him, but he had hopes that something would be done for him.

As a part of this agreement to cooperate, Johnson gave the government a written statement, he testified before the Grand Jury in this case and in the other conspiracy case (Cr. No. 288-62), and he testified in the instant case. He was charged as a defendant in this case. In the company of his lawyer and upon his advice, he pleaded guilty to Count 3. *Significantly, his lawyer was recommended to him by Mr. Smithson, the Assistant United States Attorney, who represented the Government in the case.* (*Tr. p. 203-11; JA 30-37*).

Certain Prayers Offered By Defendant's Counsel

Before the case was submitted to the jury, the appellant Matthews submitted three written instructions to the Court regarding the witness Clinton Johnson as follows:

1. "The witness Clinton Johnson who testified in this case for the government is a paid informer and a drug user. You will recall that he admitted to this on the witness stand. In evaluating the testimony given by this witness against the defendant, Charles Matthews, you are instructed that his credibility, as the credibility of all witnesses, is for you to decide. Credibility ladies and gentlemen of the jury, is the credence or belief that is to be given to a witness' testimony. In the instance where the witness is a paid informer, you are *required* under the law to scrutinize his testimony clearly for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. The requirement that you do so is more strong where it is additionally shown that the paid informer is also a drug user. In such an instance, *you are instructed* that you should look to see if there is some corroboration of his testimony. That is, to see if there were other and separate facts or circumstances proven in this case that tend to directly or indirectly establish that the facts about which he testified did occur. Alternatively, *you are instructed* that the testimony of a paid informer who is also a drug user *should* be received by you with suspicion and acted upon with caution." (Defendant's Instruction No. 16)

2. "The witness Clinton Johnson who testified in this case for the government was also charged as a defendant in this case. He was charged in Count 1 of this indictment, which charges the conspiracy; and was also named as a defendant in Counts 2, 3 and 4 of the indictment. These latter named counts arise from the sale of one-half ounce of heroin by him to Agent Scott on December 21, 1961. You recall the testimony of the agent and of Mr. Johnson himself regarding this occurrence, and the fact that Johnson has admitted his guilt of these offenses in open Court. Because Mr. Johnson was concerned in the commission of this specific crime, he is what is known in the Law as an 'accomplice'.

"You are instructed as a matter of law that the testimony of an accomplice *should* be received by the

jury with caution. It *should* be regarded by the jury with suspicion. It *ought* to be received by the jury with distrust. It *should* be weighed with great care. It *should* be subjected to close scrutiny." (Defendant Matthews' Instruction No. 6)

3. "In further regard to the testimony of the witness Clinton Johnson, you will recall that it was proved (1) that he has a poor criminal record; (2) that he believes that he would personally benefit by testifying for the Government in this case. These facts affect the weight that you *should* give in Johnson's testimony." (Defendant Matthews' Instruction No. 5)

The Court marked all three of the defendant's above noted requests for instructions, "denied".

Court's Instructions Relating to the Denied Prayers

The Court charged the jury in respect of the witness Clinton Johnson as follows:

"You will recall that the witness Clinton Johnson testified that he participated in certain activities on December 21, 1961, which formed the basis of the charges in the indictment in Counts 2, 3 and 4, and that he has pled guilty to one of these counts. He is what the law refers to as an accomplice.

"Now, anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another in the commission of a crime is an accomplice, and this is true regardless of the degree of his guilt.

"It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has the right to use an accomplice as a witness. It is the duty of the Court to admit the testimony of an accomplice, and that of the jury to consider it.

"It should be received with caution and scrutinized with care. After you have received it with caution and scrutinized it with care, you *may* then give it

such weight as you believe it is entitled to receive. The degree of credit which you give to such testimony is a matter exclusively within your province. You *may*, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, if you believe the accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony.

"You are told that if you find that Clinton Johnson believes he will, personally, benefit from testifying for the Government in this case, then the jury, in determining his credibility as a witness, *may* take that circumstance into consideration."

* * * *

"When Clinton Johnson testified as a witness for the United States, it was brought out that he has been convicted of committing certain criminal offenses. The jury is the judge, as I have indicated, of the credit and weight to be given to the testimony of each witness; and in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor the jury *may* consider along with the usual factors ordinarily considered in determining the credibility of a witness. That is the only purpose for which the jury has been permitted to know of Johnson's criminal record."

* * * *

"As to any witness [redacted] to which the testimony indicates that he is or was a paid informer in respect of this case, you are to scrutinize his testimony with care, and in passing on his credibility, you *may* consider whether by reason of such employment his testimony was colored in any way."

* * * *

At the conclusion of the Court's charge an objection was made by Counsel for Matthews, in part, as follows:

"Your Honor, I would object to the failure of the Court to give defendants' instructions as drawn and in the instances where the subject matter of our instructions were not given at all we object to the failure to give the substance of these instructions."

Rulings and Decisions of the Courts Below

After deliberation, the jury acquitted the defendant Matthews of all charges in the indictment, except Counts 2, 3 and 4. He was found guilty of these counts and was later sentenced to a term of 12 years imprisonment upon the convictions. The Appeal to the United States Court of Appeals followed and the decision and judgment of the District Court was affirmed. And at the proper time relief in the form of this petition was brought to this Honorable Court's attention, after Petitioner's prayer for a rehearing before the Court of Appeals was denied.

REASONS FOR GRANTING THE WRIT

The Court Erred In Failing To Instruct The Jury In Firm And Positive Language About The Way That They Were To Receive And Weigh The Testimony Of The Government Witness Clinton Johnson

The government's proof claimed to show that on December 21, 1961, Clinton Johnson sold a half-ounce of heroin to Narcotic Agent Herman A. Scott. Both Johnson, the seller, and Scott, the buyer, testified that the sale took place. Charles Matthews was charged with three offenses under the Federal Narcotics Laws in connection with this sale. It was admitted by both witnesses that Petitioner was not present when the transaction between Johnson and Scott took place and thus did not actively participate in the same. It was the government's theory that Matthews was responsible on the basis of aiding and abetting. Incorrectly, and against Petitioner's substantial rights, the government sought to establish this theory by improperly showing that at some earlier and other time and place (before the Johnson-Scott transaction) petitioner had sold drugs to Johnson.

The only evidence connecting Matthews with the offenses was derived from the witness and defendant Clin-

ton Johnson. From his lips alone, and from no other source, came the indication of Matthews' participation in the transaction. There was no corroboration, circumstantial or otherwise, to lend support to the testimony of Johnson against Matthews. Johnson's testimony that Matthews gave him the drugs, which he later sold to Scott, is entirely isolated from any other fact shown at the trial. The petitioners fate rested solely on whether the jury did or did not have a reasonable doubt about what Johnson said. Petitioner here complains, and asserts as error, that the Trial Court did not afford him a fair trial, due process and denied him substantial rights in that, under all the circumstances of the case, the court's instruction to the jury about the testimony of Johnson was too passive and mild. The instructions given the jury as to how it was to view and consider the testimony of the witness Johnson, were legally inadequate and insufficient. Further, from the evidence offered, the Court should have granted the Petitioner's motion for dismissal both at the conclusion of the Government's case and at the close of defendant's case.

To repeat, Clinton Johnson admitted he sold a half ounce of heroin to Narcotic Agent Herman H. Scott. This was undisputed at the trial. Charles Matthew was charged with three offenses in connection with this sale upon the theory that he was an aider and abetter. The sole evidence to support this theory of the government was furinshed by the testimony of Clinton Johnson; it was not corroborated or supported in any way.

It was shown on cross-examination of the witness Johnson that: he had a criminal record; he used marijuana; he was testifying for the government in this case because he wanted to help himself; he had been paid money by the Agent of the Federal Bureau of Narcotics after he agreed to cooperate with the government in this case (he was thus a paid informer); the attorney who repre-

sented him in this case was suggested and recommended to him by the government attorney who prosecuted this case; he was an accomplice to the offenses about which he gave testimony in this case.

On account of the many infirmities attaching to Johnson that affected his credibility as a witness, it was extremely important for the protection of the appellant's rights at the trial that the Trial Court should have given the Jury adequate and full instructions as to the way that they were to receive Johnson's testimony. The appellant submitted three written requests for instructions on this matter that correctly stated the law. The Trial Court refused to give the instructions as drawn and instead charged the Jury in the Court's own language. The charge that the Court gave the Jury, regarding the testimony of Clinton Johnson, was that the Jury *may* take into account certain of these facts about Johnson. The Court did not say to the Jury, as required by law that because of these facts about Johnson, it (the Jury) *should, ought* or *must* regard Johnson's testimony in a certain way. This was plain error affecting the defendant's substantive rights.

The Court did not give the Jury any instruction touching upon the fact that the witness Johnson was a user of drugs. This also was error in light of the Court of Appeals opinion in *Fletcher* v. *U.S.* (1946), 81 Appeals DC 306, 158 F. 2d 321.

As has been stated (in the Statement of Facts part of this petition), it has been shown that Johnson was: (1) he was a drug user; (2) he had a poor criminal record; (3) he was a drug peddler; (4) he cooperated with the government by testifying before the Grand Jury and as a witness at the trial against Matthews; (5) he gave this cooperation because he believed that he would benefit thereby; (6) he was partially induced to testify against the appellant upon the advice of his attorney,

who was suggested to him by the Assistant United States Attorney who prosecuted the case; (7) he was freely given money by agents of the Federal Narcotics Bureau after he indicated that he would cooperate with the government; and (8) he was an accomplice to the offenses about which he testified against Matthews.

In instructing the jury the Trial Court wholly failed to mention that in considering the testimony of the witness Johnson the fact that he was a drug user should be considered as affecting the credibility to be given to his testimony. *In fact, the court denied the appellant's written request for instructions that included this matter.*

Johnson, among other things, was an admitted informer and an admitted drug user. In this jurisdiction, the case of *Fletcher* v. *United States*, (1946), 81 U.S. App. D.C. 306, 158 F.2d 321, expresses the rule that where the entire case against a defendant depends upon the testimony of a paid informer, the jury *should* be instructed to scrutinize it closely to determine whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. The Court went on further to say that "when it additionally appears that the informer is a drug addict it is manifest either that some corroboration of his testimony should be required, or at least it should be received with suspicion and acted upon with caution."

In the circumstances of this case, that is that Johnson's testimony constitutes the entire case against Matthews and in view of the many legal infirmities attaching to the credibility of this witness, the Court should have required some corroboration of his testimony, or it should have charged the jury very firmly to receive his testimony with suspicion and to act upon it with extreme caution. By not doing so, the Petitioner was denied a fair trial, denied due process and his substantive rights were

ignored by both the trial court and the Appeals court contrary to its own rules, decisions and opinions.

The Court failed to give stern and hard cautions to the jury regarding the testimony of Johnson. The Judge did not instruct the jury in compelling and mandatory terms about the way they were to receive and weigh the testimony of Johnson in light of the matters about him that affected his credibility. In its instructions, the Court continuously used the permissive word "may" in speaking about the Jury's duty in assessing Johnson's testimony, for example:

> "After you have received it (the testimony of an accomplice) with caution you *may* then give it such weight as you believe it is entitled to receive."
>
> * * * *
>
> ". . . if you find that Clinton Johnson believes he will, personally, benefit from testifying for the government in this case, then the jury, in determining his credibility as a witness, *may* take that circumstance into consideration."
>
> * * * *
>
> ". . . in passing on the credibility of Clinton Johnson as a witness, his criminal record is one factor the jury *may* consider along with the usual factors ordinarily considered in determining the credibility of a witness."
>
> * * * *
>
> ". . . and in passing on his credibility (of a paid informer), you *may* consider whether by reason of such employment his testimony was colored in any way." (all emphasis supplied)

In these excerpts the Court was *required* under the law to use the words "*must*" or "*should*" instead of "*may*". This is not to merely point up nuances of meaning in the use of permissive directions instead of obligatory ones. The difference in meaning between "should" and "may" is real and gravely important to the rights of a

defendant who is affected by the testimony of the witness about whom the instructions are given. The law requires that the jury be told that they "should" view, receive, and weigh testimony in a certain way; not that the jury "may" do so. The Court's instructions in this case left it to the discretion and whim of the jury to decide how it *may* act, whereas the law dictates that they *must* act in a certain way.

Under the law the testimony of an accomplice *should* be received by the jury with caution; it *should* be regarded by the jury with suspicion; it *ought* to be received by them with distrust; it *should* be weighed with great care; it *should* be subjected to close scrutiny. *Williams* v. *United States* (6 Cir., 1962), 300 F.2d 662, 666; *Phelps* v. *United States*, 252 F.2d 49; *McQuaid* v. *United States*, 198 F.2d 987, 91 U.S. App. D.C. 299; *Surratt* v. *United States*, 269 F.2d 240, 106 App. D.C. 49; *Stephenson* v. *United States*, 211 F.2d 702; *Doherty* v. *United States*, 230 F.2d 605; *Stillman* v. *United States*, 177 F.2d 607.

The fact that Johnson had a poor criminal record and that he believed that he would personally benefit by testifying for the government, affected the weight that the jury *should* have given to his testimony. *United States* v. *Raimone*, 192 F.2d 861. Failure to give such instructions affected the defendant's rights to a fair trial and violated his substantive rights.

The failure of the Court to give a precise instruction on a point of law is not generally considered error in the ordinary case. But in a case such as the instant one, where the conviction of Matthews is based solely upon the uncorroborated words of Johnson, an informer, drug user, twice convicted felon, drug peddler, and accomplice, who is testifying because he believes he will benefit, the rule is otherwise. In the case of *United States* v. *Persico* (2nd Cir., 1962), 305 F.2d 534, the Court stated:

"The Government's case rested entirely upon the uncorroborated testimony, inconsistent with his earlier testimony in some respects, of an accomplice and co-conspirator who had the strongest possible reasons to become a Government witness. We must therefore scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor. *Glasser* v. *United States*, 315 U.S. 60, 67, 62 S.Ct. 457, 86 L. Ed. 680 (1942)."

In *Betts* v. *Brady* 316 U.S. 455 @ 473, 62 S.Ct. 1252 @ 1262, this Court ruled that "the Fourteenth Amendment 'prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right.'" Therefore your petitioner pleads that when a judge gives instruction to the jury in such a manner that is arbitrary and unfair and irregular, contrary to settled opinions rendered by the various courts all over the country, his petition ought to be granted on account of the conflicting decisions upon the Constitutional question involved.*

CONCLUSION

WHEREFORE, it is urged that the Trial Court committed prejudicial error in failing to adequately and sufficiently instruct the Jury regarding how it was to receive and weigh the testimony of the witness Clinton Johnson.

This error, among the others claimed, should have warranted and justified a reversal of the conviction of Charles Matthews in this case and if the Court of Appeals was compelled to follow its own rules and decisions

* In re McKnight, C.C. 52 F. 799; *Wilson* v. *Lanham*, 1 Cir. 99 F. 2d 544; *Boyd* v. *O'Grady*, 8 Cir. 12 F.2d 146; *Carey* v. *Brady*, 4 Cri. 125 F. 2d 253.

and opinions as noted in this petition, a remand of his appeal to the District Court, for a new trial for the reasons previously spelled out should have been granted. It was error not to do so and in the name of Justice your petitioner prays that such wrong be corrected by this Honorable Court through the granting of the petition for a writ of certiorari.

Respectfully submitted,

I. WILLIAM STEMPIL
Attorney for Petitioner
Charles Matthews

Dated: September 27, 1963

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17475

CHARLES MATTHEWS,
Appellant,

v.

UNITED STATES OF AMERICA.

Appeals from the United States District Court for the District of Columbia.

Decided May 29, 1963

Mr. John A. Shorter, Jr., for appellant in No. 17475.

Mr. Robert B. Yorty (appointed by this court) for appellants in Nos. 17557 and 17558.

Mr. Barry Sidman, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Frank Q. Nebeker* and *Frederick G. Smithson*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. Gerald A. Messerman*, *Assistant* United States Attorney, also entered an appearance for appellee in No. 17557.

Before FAHY, WASHINGTON and BURGER, *Circuit Judges.*

PER CURIAM: In No. 17475 the appellant Matthews was indicted with others for violations of the federal narcotics laws, 21 U.S.C. § 174, 26 U.S.C. § 4704(a), and 26 U.S.C. § 4705(a). One count charged conspiracy, the others substantive offenses involving 7 transactions each of which gave rise to 3 counts. At a rather lengthy trial appellant was convicted of three counts which grew out of one of the transactions. The principal testimony against him was that of an accomplice who was shown to have a very unsavory criminal record. Because of this and the fact that the witness had himself used drugs appellant contends that the trial court failed to instruct the jury strongly enough as to the caution with which the jury should consider this testimony, refusing to grant an instruction presented by appellant's counsel.

The court, while instructing the jury that it might convict on the uncorroborated testimony of an accomplice, instructed also that such testimony should be received with caution and scrutinized with care and that the jury should convict upon such uncorroborated testimony only after they had carefully and cautiously scrutinized it. Considering this instruction along with that given on credibility in general we think the court did not err in not enlarging upon this aspect of the case. See *Fletcher v. United States*, 81 U.S. App. D.C. 306, 158 F.2d 321 (1946). The judgment in No. 17475 accordingly will be affirmed.

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal No. 289-62

UNITED STATES OF AMERICA

v.

CHARLES MATTHEWS

On this 13th day of December, 1962 came the attorney for the government and the defendant appeared in person and by counsel, John Shorter, Esquire, and an information having been filed on November 13, 1962 that Charles Matthews was convicted of violating the Federal Narcotics Laws on June 29, 1955; and the defendant having affirmed in open Court that he is the same Charles Matthews previously convicted:

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of violating Title 26 of the United States Code, Sections 4704 (a) and 4705 (a), and Title 21 of the United States Code, Section 174 (Federal Narcotics Laws), as charged in Counts 2, 3, and 4, and that he is a second offender under Title 26 of the United States Code, Section 7237, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twelve (12) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Burnita Shelton Matthews
United States District Judge

Clerk

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,475 September Term, 1962

Filed United States Court of Appeals for the District of Columbia Circuit, Nathan J. Paulson, Clerk

CHARLES MATTHEWS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Before:

Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright and McGowan, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court that the petition is hereby denied.

The Clerk is hereby directed to transmit forthwith the opinion and certified copy of the judgment in this case to the District Court.

Per Curiam.

Dated: July 30, 1962

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,475. September Term, 1962

CHARLES MATTHEWS,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Before:

Fahy, Burger and Washington, Circuit Judges in Chambers.

ORDER

On consideration of Appellant's motion to recall and Stay the transmission of the opinion and certified copy of the Judgment in this case, it is ordered by the Court that Appellant's Petition is hereby denied

Per Curiam

Dated: September 26, 1963